2017 Case Law Review:

Sanctions, Spoliation, & Data Insecurity

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The Year Big Data Made Big Trouble

To be a legal professional in 21st Century is not so different than sweeping a minefield blindfolded with no metal detector. It is, to be sure, a perilous endeavor. Why? Because of data.

Today, your ability to effectively practice law at the highest levels hinges on data. Think about it: whether you're trying to gather facts to craft an argument, communicating with clients, or running your own "virtual law office," you're dealing with data—huge, ungodly amounts of data. And that data is unpredictable, it's hard to find, and, there's a good chance it will blow up in your face at any moment.

It's 3 AM and you're reading a Google alert with your name on it...

How did you get here? You didn't go to school for this. You wanted to be Matlock. You wanted to be Atticus Finch or Daniel Kaffee or Elle Woods, wooing a jury with your silver-tongued pontificating and making judges swoon. You couldn't care less about data. And that's why you're reading an article in the New York Times about how you accidentally turned over 50,000 incredibly sensitive client files to the guy who's *suing your client*. Oops.

This isn't a dream. It may not have happened to you, but it happened to some unfortunate attorney whose story you'll come to know in the pages below. You'll also read about hard-learned lessons from several cases where bungled technology unleashed chaos—and several more where it gave a decisive upper hand to the party in the know. If there's a theme, it's this: data can make or break your case, your client and your career. So it's time to start paying it attention.

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Bad ESI Agreement Leads Court to Shift Costs: *Bailey v. Brookdale University Hospital Medical Center*

Entering into an ESI agreement after a meet and confer can be a great way for both parties to maintain control over the discovery process, to avoid unnecessary conflicts and escape punishing discovery burdens. Or it can be result in an embarrassingly lopsided agreement, one which blows up in both parties' faces. This case is one of the latter.

Case Background:

Bailey v. Brookdale University Hospital Medical Center, No. CV 16-2195 (ADS) (AKT), 2017 BL 205281 (E.D.N.Y. June 16, 2017) began as a fairly routine employment discrimination suit. The plaintiff, a former labor relations manager at Brookdale, accused the hospital of harassment based on his age and national origin. When it came time to meet and confer, the defendant hospital agreed to produce, *in hardcopy*, non-privileged emails relating to the plaintiff's job performance and termination, sent between Bailey and three other individuals during a year-long period.

The plaintiff, in return, agreed to produce all personal email containing any of 20 search terms, any email exchanged between the plaintiff and any current or former hospital employee, any emails "in any way relating to his employment," all "current and historical records" from Facebook, Instagram, Reddit, YouTube, Myspace, LinkedIn, and Twitter, all text messages between the plaintiff and hospital employees, and all text messages "in any way relating" to his employment or the lawsuit. One party's discovery obligations were memorialized in two bullet points. The other's required more than 20.

When discovery actually began, a vendor told Bailey that discovery for a single Yahoo email account would cost over $5,000 in total, requiring up to four days just to ingest and process data—an extremely slow and expensive process.

Bailey threw himself on the mercy of the court, claiming that conducting discovery on even one email account under these circumstances would constitute an undue burden.

The Court's Reasoning:

While the ESI agreement was "undoubtedly thorough," the hospital's discovery request "appears to have been drawn for use in corporate settings as opposed to the single plaintiff discrimination case," U.S. Magistrate Judge A. Kathleen Tomlinson explained.

"Plaintiff's counsel has placed his client in the position of having to abide by an agreement," the court continued, "which, in the current context, appears overly complex in light of the straightforward subject matter and claims involved here."

It appeared, the court concluded, that Bailey's counsel failed at several turns. He did not have meaningful discussions with his client about the potential costs of producing the information sought. He did not engage in a meaningful meet and confer. He did not "thoroughly review the Agreement (or consider its ramifications) prior to signing it."

But this was not a win for the defense, despite the fact that a party must typically bear the consequences for the failings of its counsel. Citing the court's "over-arching responsibility to ensure a level playing field for both sides," the court ordered parties to split the cost of discovery, with the defendants shouldering 40 percent of those costs, should they "insist on the production being made to the letter" of the agreement.

Takeaways:

Here, both parties seemed to have failed when it comes to engaging in a meaningful meet and confer and entering into a useful ESI agreement. The plaintiff, of course, agreed to a scope of discovery that was unnecessarily burdensome and far out of proportion with the case at hand. But the defense, in requesting such lopsided discovery obligations, did itself no favors, either. In the end, the disadvantageous ESI agreement was a hindrance to both parties.

Bailey v. Brookdale shows that at least some courts will act to "ensure a level playing field" in discovery, despite the unequal playing field the parties may have created in their ESI agreement.

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A Clawback Agreement Can't Save a Botched Privilege Review: *Irth Solutions, LLC v. Windstream Communications, LLC*

A clawback agreement, entered into at the beginning of the discovery process, can often protect against the risk of producing privileged documents to the other side. Often, but not always. In *Irth Solutions, LLC v. Windstream Communications, LLC*, No. 2:16-cv-219, 2017 BL 268873 (S.D. Ohio Aug. 02, 2017), the court ruled that an existing clawback agreement was of no use following a "reckless" production.

Case Background:

This lesson on privilege waiver came out of a contract dispute between a software company, Irth Solutions, and a telecom utility, Windstream Communications. At the outset of discovery, the parties both agreed that a formal 502(d) order was not necessary and entered into a joint clawback agreement. Under that agreement:

- If a producing party discovers that it had inadvertently produced a document that is privileged, the producing party would promptly notify the receiving party of the inadvertent production.
- The receiving party would promptly destroy or return all copies of the inadvertently produced document.
- Inadvertent production of privileged documents would not operate as a waiver of that privilege.

When it came time to produce, Windstream repeatedly turned over dozens of privileged documents, representing more than 10 percent of the whole production. Many of those documents included phrases that should have easily alerted counsel of potential privilege, phrases like "legal" and "guidance from legal" and emails including the signature "Counsel to Director of Government Contract Compliance."

Irth refused to return the documents, given that Windstream had taken over three months to review them for privilege. Windstream then moved for sanctions. As that dispute played out, Windstream was asked to engage in a second production, as the first document set had not been rendered searchable. In this second round, the company produced the privileged documents *again*, even as it was fighting to claw them back from the first production.

The Court's Reasoning:

The parties' clawback agreement was not enough to save Windstream here. As the court noted, there is still disagreement on "how to analyze inadvertent disclosures when a cursory clawback agreement exists and alleged carelessness caused an inadvertent production."

Courts' approaches fall into three categories. In the first approach, used in Kansas, New Jersey, and Washington, D.C., any clawback agreement, "no matter how cursory," will mandate the return of inadvertently produced documents. The court here, however, rejected this permissive approach as "inconsistent with the underpinnings of Rule 502."

Under the second approach, used by district courts in the Second Circuit, a clawback agreement will be effective "unless the document production process itself was 'completely reckless."

Under the third, and strictest, approach courts allow parties to contract around Rule 502(b)'s requirements only to the extent that the agreement provides "concrete directives regarding each prong of Rule 502(b)." That includes defining inadvertence, stating what precautionary measures are required, and establishing post-production responsibilities. In cases where such specificity isn't present, "Rule 502(b) is interstitial, filling the silent gaps."

Here, under both the second and third approach then, Windstream's actions during discovery were insufficient to preserve privilege. Despite Windstream's counsel's claims that all the documents had undergone two rounds of review, U.S. Magistrate Judge Kimberly A. Jolson was "unconvinced that any meaningful review of the documents occurred."

(This case could easily be subtitled "Irth, Windstream, and Someone's Getting Fired.")

Windstream's production was clearly reckless, with a high percentage of the production containing privileged documents and those documents, in turn, containing keywords and phrases that would have made them easy to spot.

Takeaways:
Parties cannot always depend on a broad clawback agreement to protect them against the waiver of attorney-client privilege during discovery—particularly when a party's privilege review is so deficient. As the court here notes, there is not a consensus approach to enforcing clawback agreements. Legal professionals, thus, must know what regime they are under and act accordingly.

This case, too, emphasizes the importance of simply knowing how to conduct an effective review, and having the technology to do it well. This was a case, the court noted, where "normal cracks became chasms," but the disaster that ensued was entirely avoidable.

eDiscovery Comes Early to Collective Action: *Rabin v. PricewaterhouseCoopers LLP*

When it comes to high-impact, high-value litigation, class certification can mean the difference between a major case and none at all. But before a putative class action under Rule 23 or a conditional collective action under the Fair Labor Standards Act can move beyond the putative stage, plaintiffs in federal court must overcome several initial burdens. For class actions, that means meeting Rule 23's numerous requirements: numerosity, commonality, typicality, adequacy, the list goes on. For those actions brought under the FLSA and related statutes, an initial showing that potential plaintiffs are "similarly situated" is required.

So, when attempting to prove that certification is warranted, can plaintiffs engage in pre-certification discovery? Yes, according to this recent case out of the Northern District of California, which allowed limited pre-certification discovery while acknowledging that no previous case law provides "a definitive answer on the appropriate scope of pre-certification discovery."

Case Background:
This decision at issue here, *Rabin v. PricewaterhouseCoopers LLP*, No. 3:16-cv-02276 (N.D. Cal. Apr 27, 2016), arose out of an age discrimination lawsuit against PricewaterhouseCoopers. PWC may be one of the nation's oldest accounting firms, tracing its origins back to 1849, but it's average employee is a scant 27 years

old, according to company documents. The plaintiffs here argue that the firm's employment practices, particularly their recruiting strategies, have a disparate impact on older applicants, in violation of the Age Discrimination in Employment Act, which incorporates the FLSA's collective action standards.

At the beginning of such a suit, the court determines whether the action should be treated as a collective action. That determination is based on a showing that members of the proposed action are "similarly situated," which requires only a "modest factual showing" by the plaintiffs.

Here, the older PWC applicants sought to engage in pre-certification discovery in order to help make that modest factual showing. PwC, however, disagreed. The plaintiffs are not entitled to ESI prior to conditional certification, the firm argued.

The Court's Reasoning:

The question was a novel one, the court explained, with existing case law providing no clear answer. "In their back and forth," U.S. District Judge Jon S. Tigar noted, "neither party cites a Ninth Circuit decision, or even a case from this district." Further, "none of the out-of-district cases provide a definitive answer on the appropriate scope of pre-certification discovery."

Thus, the court concluded that, while full discovery is not appropriate prior to certification, limited discovery may be permissible. As Judge Tigar wrote:

> At bottom, although Plaintiffs are not entitled to complete discovery before their collective is conditionally certified, the Court sees no reason to prevent them from obtaining and using ESI discovery to support their motion. Nor has any party cited a case that clearly prohibits them from doing so.

The Takeaways:

Those engaged in class actions at the pre-certification stage should not expect full discovery to be available prior to certification. But that does not mean that no discovery will be permitted. Limited discovery, done to support a certification motion, is perfectly plausible after *Rabin v. PricewaterhouseCoopers LLP*.

However, that discovery process should not delay the speedy advancement of the

case. Here, Judge Tigar required both parties to engage in a fast-paced discovery timetable that, while "aggressive, it is not unreasonable."

Supreme Court Reins in Sanctions for Bad-Faith Discovery Misconduct, Slightly: *Goodyear Tire and Rubber Co. v. Haeger*

Despite years of contentious discovery, despite significant judicial refereeing throughout that process, you manage to get through discovery without turning over a key, and much-requested, piece of evidence and settle the case on the eve of trial. And you could have gotten away with it scot-free, had the evidence not been disclosed in a separate suit shortly after.

Can you still be sanctioned for your bad-faith discovery misconduct after the case has terminated? Yes, of course—for millions. But this Supreme Court ruling, *Goodyear Tire and Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017), limits courts' ability to make those sanctions punitive.

Case Background:

In the summer of 2003, the Haeger family loaded up their motorhome and headed east for a medical conference. As they were driving down the highway, their tire blew out, sending their Gulf Stream careening off the road and the Haegers' Great Dane flying through the windshield. (The Haegers and their dog all survived.)

The family sued Goodyear, the maker of the tire, arguing that their tires were defective, unable to withstand the heat generated when being used by motorhomes traveling at highway speeds. The discovery process turned out to be particularly heated as well, lasting several years and requiring repeated intervention by the district court. Throughout that process, the Haegers' attorney repeatedly sought Goodyear's internal tests on the tires. The tests were never produced.

The case settled the day before trial, for an undisclosed amount. When the Haegers'

attorney later learned that the tests not only existed but had been produced in a separate lawsuit, he moved for sanctions.

The district court awarded $2.7 million in sanctions to the Haegers, covering all attorneys' fees from the beginning of Goodyear's bad-faith conduct onwards.

"The necessity for sanctions in these circumstances is obvious," District Court Judge Roslyn O. Silver explained. But the basis for those sanctions was unclear—the various rules and statutes allowing sanctions either did not apply because of the case's procedural posture or did not impose an adequate penalty. Thus, the court relied on its inherent authority to sanction Goodyear and its counsel. But those sanctions would be issued without drawing "precise causal connections between the misconduct and the fees Plaintiffs incurred," which would be "impossible."

A divided Ninth Circuit panel affirmed the sanctions and the case made its way up to the highest court in the land, which rejected the district court's approach.

The Court's Reasoning:

In a unanimous, eight-justice decision written by Justice Elena Kagan, the Supreme Court rejected both the district court and Ninth Circuit's approach to sanctions. While courts have the inherent authority to impose sanctions for misconduct, the court explained, in civil case those sanctions must be *compensatory* rather than *punitive*.

For such sanctions to be compensatory, they must be "calibrated to the damages caused by the bad faith acts." As the court explains, "Compensation for a wrong, after all, tracks the loss resulting from that wrong." To go any further "crosses the boundary from compensation to punishment."

Thus, courts must then establish a causal link between the sanctionable conduct and the opposing party's legal fees. This requires a "but-for" test which "generally demands that a district court assess and allocate specific litigation expenses."

The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued.

Courts need not become "become green-eyeshade accountants (or whatever the contemporary equivalent is)," however, and in "exceptional cases" may still shift fees "in one fell swoop."

The Takeaways:

Courts' inherent authority to sanction discovery misconduct, or at least misconduct that falls outside of the statutory and rules-based sanction regimes, seems to have survived *Goodyear* largely unscathed. The case also confirms that courts have the power to impose sanctions even after a final order has been entered. But, while courts have broad authority to impose sanctions for misconduct, *Goodyear* reminds us that those sanctions must be allocated based on the specific expenses for which the sanctionable conduct is responsible.

While *Goodyear* was a rare Supreme Court foray into the world of discovery, the case's overall impact on discovery sanctions may be limited, however.

As recently retired U.S. Magistrate Judge James C. Francis IV told Logikcull in an interview shortly after the decision, "I think you could say that the rumors that *Goodyear* would be the demise of inherent authority were premature."

"It did not say that you don't have inherent authority to impose punitive attorney's fees," he continued. "All it said was if you're going to do that, you have to provide the party with due process as you would in any contempt proceeding." Whether courts will pursue that avenue, or stick to the Supreme-Court-approved accounting measures remains to be seen.

SCOTUS Puts the Kibosh on "Rocket Docket" Forum Shopping: *TC Heartland LLC v. Kraft Foods Group Brands LCC*

For decades, the Eastern District of Texas has played an outsized role in patent litigation, as IP plaintiffs, patent trolls and legitimate litigants both, rushed to the district because of its plaintiff-friendly local rules. The venue is so popular that some frequent defendants have started sponsoring public amenities in an apparent effort to curry favor, like when Samsung sponsored the construction of an ice rink directly in front of one E.D.Tex courthouse.

Those days are coming to an end, now that the Supreme Court has made such patent litigation forum shopping much more difficult.

Case Background:
TC Heartland LLC v. Kraft Foods Group Brands LCC, 137 S. Ct. 1514 (2017), began with a dispute between two manufacturers of flavored drink mixes, with Kraft Foods accusing TC Heartland of infringing its patent for a "liquid water enhancer." And though the Eastern District of Texas is the district court most impacted by the outcome, this juicy dispute actually began in the District of Delaware, where Kraft initiated its patent suit. TC Heartland then moved to transfer the case to Indiana, where it was incorporated.

What ensued was a conflict between two venue provisions, a conflict that eventually made its way to the Supreme Court, upending the IP forum shopping system that's been in place for over 25 years.

The case called for the court to reconcile two venue provisions. The first, 28 U.S.C. § 1400(b) is particular to patent litigation, stating that a patent infringement lawsuit may be brought "where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business."

The second statute involved a broader definition of residence, however. The general venue statute, 28 U.S.C. § 1391(c), defines corporate residency much more expansively, allowing businesses to be sued "in any judicial district in which such defendant is subject to the court's personal jurisdiction".

In 1990, the Federal Circuit ruled in *VE Holding Corp v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), that the definition of corporate residence in § 1391(c) applied to the patent venue statute—a decision which eventually allowed plaintiffs to concentrate a vast amount of patent litigation in only a few courts.

The Court's Reasoning:

Asked to interpret these two venue provisions, the Supreme Court ruled that the residence provision under § 1400(b) refers only to the state of incorporation, and that § 1391(c) did not change that. In another unanimous, eight-Justice decision, this time authored by Justice Clarence Thomas, the court rejected the idea, embraced by the Federal Circuit, that later amendments to the general venue statute also modified the patent venue provision.

Sixty years ago, the Supreme Court ruled in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), that under §1400(b) a domestic corporation "resides" only in its state of incorporation. Later congressional amendments did nothing to change that interpretation, the court reasoned, as "When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent." No such indication was present here.

The Takeaways:

If you recently invested in a hotel development or favor-winning ice rink in Marshall, Texas, see if you can get your money back. The Eastern District of Texas's rocket docket, and forum shopping in patent litigation generally, is facing a major threat from *TC Heartland*.

Fewer patent cases are already being filed in the E.D.Tex and parties with existing litigation there have been successfully moving to return cases to their home venue—despite some judges' resistance. In the first major decision following *TC Heartland*, for example, the Federal Circuit ruled that U.S. District Judge Rodney Gilstrap could not refuse to transfer venue despite the fact that the movant company did not

"reside" there under *TC Heartland*. Judge Gilstrap had presided over nearly a quarter of the nation's patent lawsuits in the pre-*TC Heartland* era. That's unlikely to be the case in the future. However, judges in Delaware may soon take his place, as more than 50 percent of U.S. companies are incorporated there.

When Privilege Gamesmanship Backfires: *Waymo LLC v. Uber Technologies, Inc.*

Waymo, the self-driving car branch of Alphabet, the Google-owning tech behemoth, is in the midst of what could be a life-or-death lawsuit against Uber over the future of the self-driving car industry.

During discovery, Uber revealed the content of discussions involving its executives and its in-house counsel, in a potential attempt to introduce beneficial information. In the process, however, it waived attorney-client privilege protections to the entire subject matter of those conversations.

Case Background:

Waymo accuses Uber of misappropriating trade secrets, stemming from Anthony Levandowski's move from Waymo to Uber a year ago. Levandowski, a self-driving car expert, was an engineer at Waymo until he left in January, 2016 to form his own autonomous truck company, Otto. Six months later, Uber bought Otto for $680 million, with Levandowski joining the tech company as vice president of engineering for its self-driving car project. That move, Waymo alleges, was a circuitous scheme to steal Waymo's technology.

A day after the suit was filed, Levandowski told Uber that he had downloaded documents from Waymo—Waymo puts the number at 14,000 files—before departing in order, he said, to help him work from home and, perhaps, to make sure he was given a bonus by Google. Levandowski later announced that he would be asserting his Fifth Amendment right against self-incrimination, potentially keeping his explanation for the downloads out of court. Uber fired Levandowski in May.

When Uber's then-CEO Travis Kalanick was deposed by Waymo, he discussed the content of conversations he had with Levandowski, other Uber executives, and

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Uber's associate general counsel.

The conversations in question took place not long after Waymo sued Uber. Levandowski, then still in charge of Uber's self-driving car engineering team, had met with Kalanick and Uber's counsel to discuss the suit and his intent to invoke the Fifth Amendment. Three days later, Levandowski met again with Uber executives and lawyers, followed by a smaller meeting with Kalanick and Angela Padilla, Uber's associate general counsel for litigation and employment. In his deposition, Kalanick testified to the content of the conversations with Levandowski, including his reasons for invoking the Fifth.

The Court's Reasoning:

That testimony waived attorney-client privilege not just for those conversations but for the subject matter of Kalanick's testimony, U.S. Magistrate Judge Jacqueline Scott Corley ruled in *Waymo LLC v. Uber Technologies, Inc.*, No. 3:17-cv-00939-WHA (N.D. Cal. Aug. 8, 2017). But when the issue came before the court, the typical roles in a privilege-waiver dispute were reversed. Uber, the purported privilege-holder, had argued that these conversations between its in-house counsel and executives were *not privileged* whatsoever. However, other conversations, involving a similar cast of characters, Uber said, did fall under attorney-client privilege protections, as Uber's counsel offered legal advice during those discussions.

Waymo argued that not only were the conversations Kalanick testified about privileged, but that Uber had waived any privilege objection not just to the conversation itself, but to the entire subject matter.

The purpose of the conversations, the court concluded, "was to learn information from then-Uber executive Mr. Levandowski to enable [Uber's in-house counsel] and her colleagues to advise their client—Uber—about how to proceed in the lawsuit."

Magistrate Judge Corely, who had earlier said that that Uber's position left her "flabbergasted," rejected Uber's assertion that the attorney was simply present to offer "comfort."

“Why was Ms. Padilla a comfort?” she wrote. “Because she was the in-house litigation counsel and Mr. Kalanick was hoping to learn facts relevant to this litigation.”

The Takeaways:
If Uber’s strategy was to selectively work around privilege, revealing only the information that might benefit it, that approach would seem to have crashed and burned here. So, beware litigation gamesmanship when it comes to attorney-client privilege.

Courts are wary of litigants attempting to use privilege as both a sword and a shield. Attempting to strategically work around privilege protections, to reveal the information you want and bury the rest away, could lead to a broad waiver of protections not just to specific facts, but to the entire subject matter.

Look What You Made Me Do: Sanctions & Spoliation in Celebrity Grope Case: *Mueller v. Swift*

I’ma let you finish, but T. Swift had one of best ESI-spoliation rulings of the year. The pop star’s legal battle with a former disc jockey involved not just accusations of offensive groping, but of the destruction of key evidence.

Case Background:
David Mueller, a former DJ in Denver, Colorado, met with Swift in June of 2013, before a concert in Denver’s Pepsi Center. The two chatted and then poised for a picture. As the photo was being snapped, Swift says, Mueller lifted her skirt and grabbed her derrière. After Mueller left, Swift complained about the touching, resulting in Mueller’s removal from the concert and, two days later, his firing from his morning radio gig.

Mueller sued Swift in 2015, accusing her of tortious interference with prospective business relations and intentional interference with contractual obligations. Swift countersued for assault and battery.

While Mueller’s alleged groping may have been caught on camera, his firing was also captured on tape—well, the digital equivalent of tape, anyway. During the

investigation that led to his termination, Mueller surreptitiously recorded his conversations with representatives from the radio station.

At some point after contacting his attorney, Mueller edited the recordings down to "clips" meant to, he says, "give an idea of what kind of questioning I went ... through." The original digital recordings still existed until Mueller spilled coffee on his computer. Mueller then replaced his laptop and did not keep the original hard drive or recover any files from it. An external hard drive with a copy of the files similarly "stopped working" and was discarded, leading to the loss of the ESI.

Swift moved for sanctions, arguing that Mueller's spoliation should give rise to an adverse inference instruction, directing the jury that the entire recording "would have been unfavorable to Plaintiff."

The Court's Reasoning:

U.S. District Judge William J. Martinez, of the District of Colorado, did impose sanctions against Mueller, in *Mueller v. Swift*, No. 1:15-cv-01974 WJM-KLM, 2017 BL 250171 (D. Colo. July 19, 2017), but not the strict measures Swift had sought. For an adverse inference instruction to be issued under Federal Rule of Civil Procedure 37(e)(2), the court explained, the court must find that evidence was destroyed in bad faith. However, Mueller's destruction of the recordings, Judge Martinez determined, fell somewhere between mere negligence and bad faith on the "continuum of fault."

Without a "a more clear showing that Plaintiff's conduct reflected his own 'consciousness of a weak case,'" the harsh penalties allowable under Rule 37(e)(2) were not available, Judge Martinez explained, concluding that Mueller was merely "unjustifiably careless in his handling of evidence that he had a clear duty to preserve."

Unjustifiable carelessness, though, does fall under the umbrella of Rule 37(e)(1) and the fairly broad remedial measures that rule allows. (When a party is prejudiced by the spoliation of ESI, the rule notes, the court "may order measures no greater than necessary to cure the prejudice".)

The appropriate measure in this case, according to the court, was to allow Mueller to be cross examined before the jury regarding the destruction of ESI, "notwithstanding

any limitation under Federal Rule of Evidence 611(b)," thus allowing questioning beyond the subject matter addressed during direct examination. If the jury determines that Mueller acted in bad faith, the court explained, "they will draw their own adverse inferences, whether the Court instructs or not."

The Takeaways:
When it comes to an ESI preservation obligation, you can't just shake it off—or spill coffee on it and throw it out. But when seeking to obtaining sanctions for spoliation, litigants need to make a showing that the other party was sufficiently culpable if they want a court to impose the harsh sanctions allowed under 37(e)(2). Swift here failed to do so. (Though she eventually won her case nonetheless.)

Why the Internet Is the New "Park Bench" in the "Leaving Your Client Folder on a Park Bench" Metaphor: *Harleysville Insurance Co. v. Holding Funeral Home, Inc.*

What happens when you use an off-the-shelf file-sharing site to distribute confidential case materials? Usually, the persons for whom they are intended receive them. And, occasionally, all hell breaks loose.

The Harleysville Insurance case is one with many twists turns and, in the end, a reversal—when the district judge overruled a magistrate who had said the disclosure of materials by the producing party constituted a privilege waiver.

Case Background:
This case begins like so many others, with the defendant burning down his mortuary for the insurance money. The insurer refused to pay, citing potential arson, and opened an investigation into the conflagration. One of the insurer's investigators uploaded a video of the fire scene to an unsecured Box file sharing site and then sent an email to their NICB contact to "share" the link to the Box file. Seventh months later, the same employee used Box to share the insurer's confidential claim file with their outside counsel. The insurer uploaded the claim file to the very same Box folder, then emailed a link to the folder to the insurer's outside counsel, who reviewed the claim file, and left it there.

That email was then produced to the defense during discovery, giving the defense attorneys access to the casefile. That very same day they downloaded and read it. Then, they shared it with all of the other defense counsel, their clients and even law enforcement officials in a related criminal case, as well.

The insurer might never have found out about this, except that—astonishingly—defendant produced the claims file back to the insurer in the defendant's discovery production a few months later. Within a few days, the insurer's counsel requested the destruction or return of the file, a request the defendant refused. Plaintiff then filed a motion seeking the return of the file and sanctions against defendants.

The Court's Reasoning—Both Times:

Harleysville Insurance resulted in two significant decisions on discovery, privilege, and the consequences of not understanding internet basics. Initially, U.S. Magistrate Judge Pamela Meade Sargent ruled that the insurance company's failure to protect the casefile from disclosure waived privilege. (*Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15cv00057, 2017 BL 39576 (W.D. Va. Feb. 09, 2017).) "With regard to the reasonableness of the precautions taken to prevent the disclosure," Magistrate Judge Sargent wrote, "the court has no evidence before it that any precautions were taken to prevent this disclosure."

Uploading the documents and failing to protect them from outsiders, the court analogized, was "the cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it."

"It is hard to imagine an act that would be more contrary to protecting the confidentiality of information than to post that information to the world wide web," the court said.

Several months later, however, U.S. District Judge James Parker Jones overruled that finding of waiver. (*Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15cv00057, 2017 BL 39576 (W.D. Va. Oct. 02, 2017).) The documents, Judge Jones explained, were not available to just anyone on the web. Rather, for someone to access those documents simply by guessing the URL would be virtually impossible. "The security of the Box Folder, then, is inherent in the nature of the URL," he determined, offering

his own park-based metaphor:

> As far as real-world equivalents go, it is more appropriate to characterize the briefcase as having been buried somewhere in a large park, technically publicly-accessible, but for all practical purposes, secured.

The Takeaways:
In the end, the main lesson from *Harlesyville Insurance* is that, when it comes to misunderstanding technology, even when you win, you lose.

The district court judge's reversal is, in some ways, a vindication for the insurer, but one that comes with considerable cost: two evidentiary hearings, costly experts, two expensive sets of briefings and arguments. All for the plaintiff to be able to block the use of information that the court admitted contained no "smoking gun" and, in all likelihood, wasn't going to change the results of the case.

Better technology used to secure and safely share client information, and a better understanding of technology generally, could have easily prevented such a dispute in the first place.

Who Needs Bank Robbers When You Have Attorneys Like These? *Mill Lane Mgmt., LLC v. Wells Fargo Advisors, LLC*

It's every attorney's nightmare: a notice that you've accidentally handed over unprotected confidential information. To claw the information back, you're forced to file an affidavit explaining how you failed to review thousands of documents and stating "I misunderstood the role of the vendor." Now imagine that nightmare being covered by the New York Times.

Case Background:
This case begins like a Greek tragedy and it ends like one, too: Two brothers, once partners, turn against each other after their relationship sours. One brother, a former adviser with Wells Fargo Advisors, the bank's brokerage firm where he dealt with some of the bank's richest customers, sues the other brother, a current adviser, in New York and New Jersey accusing him of defamation and breach of contract, stemming from their once-shared book of business. (Wells Fargo Advisors was also

named as a defendant in the New York action.)

As part of the New Jersey lawsuit, the plaintiff brother, Gary Sinderbrand, subpoenaed emails from the bank. But when When Wells Fargo sent over its production, via CD-ROM, it turned over far more than just emails: customer names, social security numbers, financial details, and more.

That CD-ROM was then shared directly with the client, who took it to the New York Times. Times reporters were showed customer information like "financial details like the size of their investment portfolios and the fees the bank charged them," according to the newspaper. Personal and confidential information about the bank's wealthiest clients was left unredacted and there was no protective order in place limiting how the receiving party could use the data.

In an affidavit filed shortly after the breach, Wells Fargo's outside counsel in charge of the production stated that she had misunderstood the role of the third-party vendor hired to aid in discovery, as well as the technology the vendor used. Documents went unreviewed, files flagged for redaction were never redacted.

When the attorney demanded the destruction and return of the data, Sinderbrand's legal team refused, arguing that the data should not be turned over to Wells Fargo because its disclosure was not inadvertent and may have violated privacy laws. The bank was left scrambling to obtain court orders to force the data's return (in New Jersey) and limiting its use (in New York).

The Courts' Reasoning:

In an affidavit, the Wells Fargo attorney who had made the faulty production was forced to explain just how a routine discovery process had ended up as a headline-making disaster. She had not properly understood what work would be performed by the bank's eDiscovery vendor, she explained, nor how to use its discovery software.

Only the first thousand documents were reviewed for privilege and confidentiality, those that were tagged for redaction were never redacted. Other documents could have been miscoded and thousands of documents were produced without any review. The attorney then detailed the steps she took once opposing counsel informed her of the disclosures.

If there's a silver lining to this dark, stormy, destructive cloud, it's that both courts in New York and New Jersey sided with Wells Fargo's attorney. In New York, the court enjoined Sinderbrand from disseminating any of the inadvertently produced information. During a heated hearing, New York Supreme Court Judge Charles E. Ramos admonished Sinderbrand's attorney who, he said, should have known not to reveal the confidential information. In New Jersey, the court ordered Sinderbrand to return the documents and destroy any file copies that may have been made.

By that point, however, the damage was done.

The Takeaways:

Wells Fargo's discovery nightmare is a symptom of a badly kept secret in legal technology: attorneys are by and large not equipped to perform the crucial duties of eDiscovery because the eDiscovery tools themselves are archaic, complex, and risk-laden.

eDiscovery increasingly exposes attorneys to malpractice allegations, and, as has happened with the attorney involved in this particular matter, career-threatening reputational damage. But beyond the personal consequences, eDiscovery is also a serious security issue—parties, from banks to the federal government, gather their most sensitive documents together in repositories that become low-hanging fruit for cybercriminals, inside traders, nefarious legal adversaries, and unscrupulous insiders.

Part of the problem stems from outdated technology provided by a third-party vendor system that relies on complexity to stay in business (after all, if any random attorney could do eDiscovery herself, you wouldn't need a vendor in the first place). Poorly made eDiscovery software can take months to learn and years to master, leading to situations like Wells Fargo's—users who simply do not understand the tool they are using and place their faith in a vendor's ability to manage discovery for them.

The more prevalent risk of human error only exacerbates the issue, and when something goes wrong, it is the attorneys (who are bound by professional duties) not

The solution is two-pronged. Better education is a must, and the pleas for better training both from the bar and from private providers will only get louder as more of these incidents become public. But lawyers will never be technologists. The average attorney is no more likely to be skilled at software as a software engineer is to be learned in the law, and that is likely to remain the case for the foreseeable future. Instead, it is incumbent upon technology providers to build software that is simple yet powerful, and intuitive, with safeguards to protect attorneys from themselves.

That software exists today. Modern discovery technology—Discovery Automation, as it is known—can automatically identify documents as potentially privileged and quickly locate and redact sensitive information like Social Security numbers. Powerful search technology virtually eliminates the need for attorneys to review documents one-by-one.

With tools that take advantage of the hallmarks of modern, cloud-based technology—secure file transfer, encryption, intuitive interfaces, auto-detection, and more—the kinds of disastrous mistakes that landed Wells Fargo and its attorneys in the New York Times can be avoided, and the legal professionals who deal in the high-risk, high-stakes arena of complex litigation can sleep a little easier at night.

Thankfully, many attorneys have already adopted these tools. For those who haven't, the responsibility now lies with them and their clients to find and start using them.

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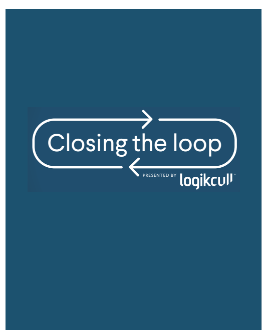

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